THE "LUNG YUNG"

THE "LUNG YUNG" & "THAI YUNG" OWNERS & ORS. v. SADIT TIMBER SDN. BHD. & ORS.

[F.C. (Raja Azlan Shah L.P., Lee Hun Hoe C.J. (Borneo) & Abdoolcader F.J.) November 17, 1983

[Kuching – Federal Court Civil Appeal No. 7 of 1983]

Practice and Procedure – Carriage of goods by sea – Claim for damages – Application to set aside statement of claim – Limitation – Jurisdiction – Stay of proceedings – Judicial discretion – R.H.C. 1980, O.18 r.19.

In this case the respondents in a admiralty action in rem claimed damages in relation to the carriage of a cargo of logs on the "Lung Yung" from Sarawak to the respondent's order in Taiwan on an allegation that the appellants wrongfully delivered the logs to a third party in Taiwan without production of the Bill of Lading. The appellants filed a defence and then applied to strike out the statement of claim on the grounds that it disclosed no reasonable cause of action and was frivolous and vexatious and an abuse of process. It was disclosed in evidence that the 2nd respondent had instituted an act in the Taiwan District Court in relation to the same subject matter and had obtained judgement but this was subject to appeals to the High Court and the Supreme Court. The Bill of Lading provided that it shall have effect subject to the provisions of the Chinese Merchant Marine Act, 1929. The appellant's summons was grounded in the issue of limitation and jurisdiction. Tan Chiaw Thong J. dismissed the application. The learned trial judge found (a) that the first ground relating to limitation failed; (b) that the statement of claim was not frivolous nor vexatious or an abuse of the process of the court as to justify the court to strike it out and to dismiss the plaintiff's claim; (c) the defendants have not succeeded in satisfying the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to them or would be an abuse of the powers of the court in some other way. On the other hand a stay would cause an injustice to the plaintiffs. Accordingly in all the circumstances and in the exercise of his discretion he refused the stay sought by the defendants. The appellants appealed.

Held: (1) the learned trial judge was wrong in virtually taking judicial notice of the relevant laws in Taiwan on the question of limitation which turned substantially on the application and construction of the provisions of the law of Taiwan. No expert evidence was adduced and the foreign law sought to be relied on was not proved. The merits of the contention could not therefore be determined in the way it was sought to be but only at a proper hearing and presentation of the requisite evidence;

(2) the learned trial judge came to the correct decision on the issue of jurisdiction and stay of proceedings. The exercise of judicial discretion by him is not lightly to be interfered with and there is a presumption that he has rightly exercised it.

Cases referred to:

(1) *Rambler Cycle Company Ltd.* v. *Peninsular & Oriental Steam Navigation Company; Sze Hai Tong Bank Ltd (First Third Party); Southern Trading Company (Second Third Party)* [1968] 1 Lloyd's Rep. 42; *Sub nomine Peninsular & Oriental Steam Navigation Co Ltd. & Ors.* v. *Rambler Cycle Co Ltd.* [1964] M.L.J. 443, C.A.

(2) *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Company Ltd* [1959] 2 Lloyd's Rep. 114; [1959] M.L.J. 200, P.C.

(3) *Smeaton Hanscomb & Co. Ltd.* v. *Sasson I Setty Son & Co.* [1953] 2 All E.R. 1471, 1473.

(4) *Playing Cards (M) Sdn Bhd* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182, 183.

(5) *Compania etc.* v. *Pacific Steam Navigation Co.* [1964] 1 All E.R. 216.

(6) *Azimullah* v. *Master of S.S. Halldor & Ors.* [1965] 1 M.L.J. 248.

(7) *The Christiansborg* (1885) 10 P.D. 141, 152.

(8) *The Soya Margareta* [1960] 2 All E.R. 756.

(9) *Logan* v. *Bank of Scotland (No. 2)* [1906] 1 K.B. 141.

(10) *McHenry* v. *Lewis* (1883) 22 Ch. D. 397, 408.

(11) *Peruvian Guano* v. *Bockwoldt* (1883) 23 Ch. D. 225.

(12) *The Atlantic Star* [1973] 2 All E.R. 175.

(13) *The Hartlepool* (1950) 84 Ll. L.R. 145.

(14) *Harmer* v. *Bell & Ors* [1843-60] All E.R. Rep. 125.

(15) *St. Pierre's* v. *South American Stores* [1936] 1 K.B. 382, 396.

(16) *Mak Sik Kwong* v. *Minister of Home Affairs Malaysia (No. 2)* [1975] 2 M.L.J. 175, 181.

(17) *Vasudevan* v. *Damodaran & Anor* [1981] 2 M.L.J. 150, 151.

HIGH COURT.

Anthony Liew for the plaintiffs.

Chew Pok Oi for the defendants.

Tan Chiaw Thong J.: By this Summons in Chambers, the Defendants apply for an Order that the Plaintiffs' Statement of Claim be struck out under Rules of the High Court, 1980, Order 18 rule 19, and under the inherent jurisdiction on the ground that

(1) it discloses no reasonable cause of action against the Defendants;

(2) it is frivolous and vexatious; and

(3) it is an abuse of the process of the Court.

And that the Plaintiffs' action against the Defendants be stayed or dismissed and that the Undertaking in Lieu of Bail given on behalf of the Defendants by the Hongkong and Shanghai Banking Corporation of No. 2, Jalan Tun Haji Openg, Kuching, Sarawak, to the Plaintiffs be cancelled and handed back by the Plaintiffs to the Defendants and that the said Bank be released from all further observance of the terms thereunder and that the Defendants be at liberty to enter Judgment for their costs, including the costs of this application to be taxed.

The claim of the Plaintiffs relates to the carriage of a cargo of 1564 pieces of Sarawak round logs ("the said logs") by the vessel "Lung Yung" ("the Lung Yung") of which at all material times the Defendants were the Owners or interested persons, from Kuala Baram, Sarawak, to the port of Kaohsiung, Taiwan. In their Statement of Claim, the Plaintiffs allege *inter alia* that, in breach of the contract of carriage and/or duty as carriers for reward, the Defendants their servants or agent wrongfully and without authority delivered the said logs to Hong Tai Plywood and Lumber Co. Ltd. ("Hong Tai") at Kaohsiung, Taiwan, without the relevant bill of lading, thereby converting the said logs; and failed to take reasonable care in the delivery of the said logs to the Plaintiffs or to the Plaintiffs' order at Kaohsiung, Taiwan. The claim of the Plaintiffs is for the sound arrive value of the said logs amounting to US$660,766.08 or M$1,434,192.78 at the rate of M$2.1705 per US$1/−, interest thereon and costs.

The grounds of the Defendants' application fall under two limbs, namely, limitation and jurisdiction, as disclosed in the supporting affidavit affirmed on March 21, 1981, of I Lung Guo, Manager of the Marine Department of Glory Navigation Company Limited, the owners of the Lung Yung at all material times. Under the first limb, with which I shall deal first, reliance is placed on the allegation that, following a Notice of Readiness to discharge cargo given by the Master of the Lung Yung to Hong Tai after the Lung Yung arrived at Kaohsiung, Taiwan, on August 12, 1979, the said logs were duly discharged from the said vessel in accordance with the regulations and practice of the Port of Kaohsiung, Taiwan (see affidavit of Chow Te Sheng, Master of the Lung Yung affirmed on 10/4/81, and its exhibit). Further, by virtue of the operation of Clauses 8, 11 and 22 in the Bill of Lading by which the contract of carriage was evidenced, delivery of the said logs took place at the time of discharge. It was contended that they were available for delivery to the Plaintiffs upon such discharge but the Plaintiffs failed to take delivery thereof at such time. Further, discharge was carried out pursuant to and in compliance with a Special Permit issued by the Customs Authorities at Kaohsiung. Accordingly, it is contended that the Plaintiffs' action is time – barred under and by virtue of Clause 27 of the Bill of Lading No. 5D/601/79 (Exhibit DLC-1 to Supplementary Affidavit of Ding Lian Cheon, Chairman of 1st Plaintiff, affirmed on March 26, 1981, and/or under and by virtue of Article III rule 6 of the Schedule to the Sarawak Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations, 1960 and/or under and by virtue of Article 100 of the Maritime Law of the Republic of China, 1929.

For the purposes of these proceedings, learned counsel for each party has stated that the allegation of facts contained in the respective affidavits filed in support of their respective cases are accepted by the other party.

On this basis, the brief facts for the purposes of these proceedings would appear to be as follows. Under the Bill of Lading No. 5D/601/79 dated August 6, 1979 ("the said Bill of Lading") mentioned above, the said logs were carried by the Lung Yung from Kuala Baram, Sarawak, for discharge at the Port of Kaohsiung, Taiwan. The Shipper was the 1st Plaintiff. The Consignee was stated to be "To Order". The other relevant particulars in the said Bill of Lading was "Notify Party: Messrs. Hong Tai Plywood and Lumber Co. Ltd. No. 188 Chien Nien 2nd Road, Kaohsiung, Taiwan". These details were repeated in the Outward Manifest of the Lung Yung (Exhibit "A" to Chow Te Sheng's affidavit). The Lung Yung arrived at Kaohsiung, Taiwan on August 12, 1979 and on the same day, the master Chow Te Sheng gave Notice of Readiness to discharge the said logs to Hong Tai, the party to be notified under the said Bill of Lading. There is no evidence that the Shipper, that is the 1st Plaintiff, was notified of the arrival of the Lung Yung, or of the Readiness to Discharge the said logs. Discharge of the said logs commenced at 11.00 a.m. on August 12, 1979 and was completed on August 17, 1979. The affidavit of Michael Ong Kee Tuan affirmed on March 20, 1981 shows (in para. 4 thereof) that the discharge of imported logs was governed by the "Regulations for Clearing Imported Logs Through Customs", the English translation of Article 3 of which states:

> "The shipping company or its agent together with the consignee of the logs as inscribed in the import manifest (hereinafter referred to as the Consignee) shall make before the actual discharge a joint application to the customs for the special permission of discharge of the cargo, and the Consignee shall also guarantee in writing that he will bear the responsibilities of custody of the logs at the place originally designated for the logs to be discharged until the customs' approval of release. At the time the logs are discharged, each log is to be marked and numbered and discharged to any of the following places as indicated on the above-said application:
>
> (A) Depositary grounds for logs.
>
> (B) Depositary ponds for logs of a bonded factory

(C) Private ponds.

(D) Rivers or designated harbour area.

(E) Other designated places."

The relevant part of Exhibit M.O. 5 (being a written report of Customs Duty Officer Choo Shaw Mou dated May 21, 1980 to the Taiwan Taipei Court) to the affidavit of Michael Ong Kee Tuan reads:

"Investigation shows that M.V. Lung Yung's 118th voyage arriving on 12.8.79, carried and imported 2 batches of round logs, among which 1564 logs are under B/L No. SD/601/79, totalling 2792 logs and measuring 6580.10 cu.Ft. Before discharge of the round logs the consignee designated on the manifest Hong Tai Co. Ltd. and the representative of the carrier San Yew Co. Ltd. then pursuant to rules submitted an 'Application for General approval to Discharge Goods' and separately, the consignee of the said batches of round logs Hong Tai Co. Ltd. submitted an 'Application for Special Approval' and 'Report of Goods entering Godowns and Joint letter of Guarantee', jointly make application to this Department for issue of approval for discharge of goods and to store the said imported logs at the following places after so discharged:

(a) the Kaohsiung Port Second Log Pond Area 4 and

(b) the said consignee's Factory log Pond and Log Yard (Section for perishing timber) at No. 471 Chow Ann Road, Chow Ann Sub-Village, Yen Chao Village, Kaohsiung District to await inspection. The consignee also gave guarantee in writing that after the logs have been discharged and before Customs release, they (The consignee) will bear the responsibility of custody and control of the logs at the original places of storage and should not on their own authority remove or use the logs.

All these are contained in the file at the archives. After that because the said consignee Hong Tai Co. Ltd. did not make Customs Declaration within the time allowed, this Department dealt the matter pursuant to Article 48 of Customs Duty Law and sent Officers to investigate who found that on their (the consignee's) own authority 2,710 pieces of the abovementioned logs had been removed and used. Pursuant to Article 18 of 'Procedure in Round Logs Importation and Customs Declaration' and Article 35 of 'Customs Preventive Rules', we had imposed penalty and demanded payment for mandatory Harbour Labourers Contribution and surcharge out from the said importation of round logs (no Customs duty is levied on imported round logs). Here too wish to clarify that the said company had stopped work now.

Enclose a photocopy of 'Procedure in Round Logs Importation and Customs Declaration' for your perusal, please."

It seems clear from this exhibit that an application was made to the relevant Taiwan Customs Department for the issue of approval for discharge of the said logs from the Lung Yung and to store them at the places specified in para. 2 of the said exhibit; and that such application was made jointly by Hong Tai and the representative of the Lung Yung San Yew Co. Ltd. "pursuant to rules". Undoubtedly, this joint application was made pursuant to Article 3 of the Regulations for Clearing Imported logs Through Customs. Exhibit M.O.5 further shows that this application was jointly made by Hong Tai in its capacity as the "consignee" designated on the manifest, meaning the import manifest (see the said Article 3). At this stage, it is to be observed that –

(a) there is no evidence to show that the 1st Plaintiff as shipper, and on whose order the said logs was to be consigned under the said Bill of lading, was informed of the arrival at Kaohsiung of the Lung Yung and of the readiness to discharge the said logs therefrom; and

(b) contrary to the said Bill of Lading and Outward Manifest, Hong Tai was according to Exhibit M.O.5 described in the import manifest of the Lung Yung as the consignee of the said logs, when it is only the party to be notified.

What transpired after the discharge of the said logs was described in paragraph 3 of Exhibit M.O.5. Bearing in mind the general position that an inward or import manifest is normally signed by the master of a vessel, para. 3 of Exhibit M.O.5 clearly indicate that the Master of the Lung Yung, or its agent San Yew Co. Ltd., was privy to Hong Tai being described in that manifest as consignee when in fact it was not. There is no evidence to show that the said Master was not at the material time acting within the scope of his employment, so that any act of his in this connection would bind his employers or principals, the Defendants. Further, bearing in mind the contents of the said Bill of Lading and Outward Manifest, it can hardly be said that, in describing Hong Tai as consignee, the said Master was unaware of the real status of Hong Tai: it is an irresistible inference, on the accepted facts in these proceedings, that the said master or agent was acting intentionally, or, at best, negligently when Hong Tai was described in the inward or import manifest as the consignee of the said logs.

It should be noted that Clause 1 (Clause Paramount) of the said Bill of Lading provides: "This bill of lading shall have effect subject to the provisions of the Chinese Merchant Marine Act 1929 and any subsequent revised Act if in force, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or

immunities or an increase of any of its responsibilities or liabilities under the Act. If any term of this bill of lading be repugnant to that Act to any extent, such term shall be null and void to that extent but no further." Clause 2 stipulates that "Any dispute arising under this bill of lading shall be governed by Chinese law *except as may be otherwise provided herein* (emphasis added), and any such dispute shall be decided by the Court in China." Clause 3, *inter alia,* states: "The carrier shall be entitled to the full benefit of, and right to, all limitations of, or exemptions from, liability authorized by any provisions of any country's law, statutes or regulations which may be pertinent." As regards Clause 3, the claim of limitation by the Defendants is also based on the applicability of rule 6 in Article III in the Schedule to the Sarawak Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960 (Swk. G.N. No. S 240 of 1960) (the 1960 Regulations"). On the assumption that the 1960 Regulations are a proper law for the purposes of these proceedings, since this is not in issue, their applicability and relevancy are, however, in issue: Rule 6 of Article III in the Schedule (the Scheduled Rules) to the 1960 Regulations provides:

"6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from the liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended, loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

Learned counsel for the Defendants has not addressed me on the matter of notice provided for in that Rule, although learned counsel for the Plaintiffs has. Nevertheless, having regard to the submission of learned counsel for the Defendants on the 1960 Regulations, what has to be considered is the legal effect of the following provisions in Rule 6, namely: "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." Learned counsel for the Plaintiffs has submitted that Rule 6 is irrelevant since it has not been incorporated in the contract of carriage as evidenced by the said Bill of Lading, and in any event Rule 6 has no application after the discharge of the said logs from the Lung Yung. To take the first part of this submission, it is true that every bill of lading or similar document of title issued in Sarawak which contains or is evidence of any contract to which the Scheduled Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied to Part II of the Scheduled Rules (see Regulation 4 of the 1960 Reg.). By virtue of Regulation 2 of the 1960 Regulations it is provided that these Rules which include Rule 6 of Article III, shall have effect in relation and in connection with the carriage of goods by sea in ships carrying goods from any port in Sarawak to any other port whether within or outside Sarawak. That Kuala Baram is a port within the meaning of this Regulation is beyond dispute (see Schedule to Merchant Shipping (Ports and Rivers) Regulations (G.N. No. S 43 of 1961). Thus, in my view, although the said Bill of Lading, does not appear to have complied with Regulation 4 of the 1960 Regulations, nevertheless by virtue of Regulation 2 thereof, Rule 6 of Article III of the Scheduled Rules would in my view have effect in relation to this particular contract of carriage of goods by sea. The next question to consider is whether, on this basis, Rule 6 of Article III, particularly that part thereof already set out, would avail the Defendants as to limitation. On this matter leaving aside the question of "delivery" with which I shall deal later, it would appear that, on the authority of *Rambler Cycle Company Ltd.* v. *Peninsular & Oriental Steam Navigation Company; Sze Hai Tong Bank, Ltd. (First Third Party): Southern Trading Company (Second Third Party)*[1] the answer is the negative. The Federal Court was there concerned with the construction of statutory provisions similar to those contained in the Schedule to the 1960 Regulations. The headnote to that case reads:

"By five bills of lading dated Sept. 25, 1953, Plaintiffs consigned bicycles and parts on board defendants' steamship Chusan to S.T. Co. in Singapore. Bills of lading provided that goods were consigned to "order" and contained clause paramount applying Carriage of Goods by Sea Act, 1924, to contract. Chusan arrived at Singapore on Oct. 25, 1953. On Oct. 27 goods were discharged into harbour board's godown and defendants' agents gave S.T. Co. an order on harbour board for delivery of goods. S.T. Co. did

not possess bills of lading but furnished a letter of indemnity by S.H.T. Bank. On same day harbour board delivered goods to S.T. Co. against delivery order. On Apr. 27, 1955, Bank of China notified defendants' agents that goods were hypothecated to it and that it held bills of lading. Plaintiffs did not recover goods or their price form S.T. Co. and on Aug. 29, 1955, issued writ against defendants for breach of contract and conversion. Defendants joined S.H.T. Bank and S.T. Co. as first and second third parties respectively and all parties concurred in stating case for opinion of High Court of Singapore. Case provided that unless defendants were discharged from liability under Art. III, r.6, of Rules scheduled to Carriage of Goods by Sea Act, 1924, plaintiffs were entitled to succeed against defendants. Third paragraph of Art. III, r.6, provided:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

Tan Ah Tah, J., held (1) that, under clause paramount, Rules contained in Schedule to Act were to be regarded as contractually incorporated in bills of lading; (2) that third paragraph of Art. III, r.6, was an exception clause; and (3) that defendants were in fundamental breach of contract of carriage and were not entitled to protection of exception clause. His Lordship gave judgment for plaintiffs against defendants for $154,404; that defendants be indemnified by both third parties; and that first third party be indemnified by second third party. Defendants and first third party appealed.

Held, by Federal Court of Malaysia (Thomson L.P., Wee Chong Jin C.J. & Wylie C.J.), (1) that general law of contract could not be prayed in aid to add to or detract from provisions of a statute; (2) that, as a matter of construction, r.6 could only refer to claims in respect of loss or damage arising by reason of the provisions of Art. III and that Art. III could only have application within the ambit of the Act as a whole; and that, therefore, Act had no relation to anything that happened to goods after they were discharged from the ship; (3) that a bill of lading was not in itself a contract but was evidence of a contract already made between the parties; and that contract though ex hypothesi it must contain terms relating to the carriage by sea of the goods concerned, might well contain terms relating to other matters; that, accordingly, shipowner's liability under a contract evidenced by a bill of lading in respect of shipments from a United Kingdom port was only subject to Rules from the time when goods were loaded on to time when they were discharged from the ship; and that, in so far as that contract involved liabilities before and after that period, it was not subject to Rules and six year period of limitation applied. Appeal dismissed.

In the leading judgment of Thomson, L.P. the following passage appears (at Pages 46-47):

"To proceed, it seems clear as a matter of construction that par. 6 can only refer to claims in respect of loss or damage arising by reason of the provisions of Art. III and that Art. III in its turn can only have application within the ambit of the Act as a whole. The real question here is as to the extent of that ambit and so to what liabilities the limitation contained in Art. III applies, or at any rate whether it applies to the liability which has been incurred by the present appellants.

Par. 6 of Art. III deals with claims in respect of loss of or damage to goods and commences by providing that notice of such loss or damage must be given within a period of three days. Then it says that "In any event", by which is clearly meant whether or not such notice has been given, the carrier and the ship are "discharged from all liability in respect of loss or damage" unless proceedings are commenced within a year.

The conclusion seems inescapable that the "loss or damage" which is referred to must be loss or damage resulting from failure by a carrier to discharge the responsibilities and liabilities set out in Art. III and this in its turn is to be read in the context of the Act as a whole. As was said by Lord Somervell of Harrow in the case of *G.H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama,* [1957] A.C. 149, at p. 174; [1956] 2 Lloyd's Rep. 379, at p. 393:

'The general ambit of the Hague Rules is to be found in article III, rule 2 ... It is, in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out ...

These responsibilities are (par. 2) to ... properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

The Act as a whole only applies (Sect. 1) "in relation to and in connection with the carriage of goods by sea" and by Art. 1(e) carriage of goods

... covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Approached purely as a matter of construction all this leads to the conclusion that the Act has no relation to anything that happens to goods after they are discharged from the ship in which they have been carried.' "

Here, it would appear that the breach of contract or duty, or conversion, alleged by the Plaintiffs against the Defendants in respect of the said logs occurred, on the facts in these proceedings, after the said logs had been discharged from the Lung Yung and hence, in my view, particularly construing Rule 6 of Article III in the light of Regulation 2, and the definition of "carriage of goods" in Article 1 and Rule 2 of Article III in the Schedule thereto, the limitation period the claim of the Plaintiffs would appear to relate to the time after the discharge of the said logs. If I am wrong on this, then, for the reason that Article 93 of the 1929 Act read with Article 105, has not been complied with, and because of what follows later in this judgment concerning the breach of a fundamental term of the contract of carriage relating to delivery to the consignee resulting in what

in my view amounted to a barring of the Defendants from relying on Clauses 8 and 27, which appear to be exception clauses, I hold that in the particular circumstances, delivery did not take place upon discharge.

It was further submitted by learned counsel for the Defendants that by the operation of –

(a) Clauses 8, 11, 12 and 27 of the said Bill of Lading; and

(b) Article 100 of the Maritime Law of the Republic of China (promulgated on December 30, 1929; effective from January 11, 1931; and as amended on July 25, 1962.

delivery of the said logs to the Plaintiffs was effected on August 18, 1979, the date of completion of discharge from the Lung Yung in the manner already described, and on which date all the said logs were freed from the ship's tackle. Hence, the institution of this action beyond the limitation period of 1 year after delivery is time-barred. It is not proposed to repeat the facts relating to the discharge of the said logs from the Lung Yung, but I bear them in mind in dealing with the submission of learned counsel for the Defendants. It was submitted that, under Clause 8 of the said Bill of Lading discharge was completed when the said logs were freed from the ship's tackle; that, by having conformed with the relevant customs regulations at the port of Kaohsiung regarding the discharge of the said logs, Clause 11 had been complied with. That clause, *inter alia,* provides that the carrier shall have liberty to comply with any orders or directions as to discharge delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof; and that such discharge shall constitute complete delivery and performance under the contract of carriage and the carrier shall be freed from any further responsibility in respect of the goods so discharge. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfilment of the contract voyage. Further, the carrier shall have the right to deposit or discharge the goods at any place whatsoever, in accordance with any direction, condition or agreement imposed upon or extracted from the carrier by such government, department thereof or person as above-mentioned. In any of the above circumstances the goods shall be solely at their risk and expense. Clause 12, in my view, does not seem to be relevant as the situations provided for therein do not appear to be applicable here. Clause 27, besides dealing with the giving of notice of loss or damage to the carrier, contains the following provision: "No suit shall be maintained unless instituted within one year after the day on which the goods were delivered, or should have been delivered and such suit shall not be deemed instituted until jurisdiction shall have been obtained over the carrier by service of process or by an agreement to appear." In this connection, no issue as to jurisdiction over the Defendants has been raised. Clause 22 provides, *inter alia,* that "the port authorities are hereby authorized to grant a general order for discharging immediately upon arrival of the ship and the carrier without giving notice either of arrival or discharge, may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the carrier may select, and continuously Sundays and holidays included, at all such hours by day or by night as the carrier may determine no matter what the state of the weather or custom of the port may be ... The goods shall be received for completion of delivery thereof by the consignee at the time of discharge from the ship, but the carrier retains the option of delivery at all times from the ship's side, or from warehouse, wharf or quay or otherwise. Shipper and consignee authorize the carrier that in case the consignee is not ready to take delivery of the goods as soon as the ship is ready to discharge them, the goods may, at carrier's discretion and subject to carrier's lien be landed and sent to store or warehouse or be permitted to lie where discharged or landed, always at the risk and expense of the goods. The goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. In any case the carrier's responsibility shall cease at the time when the goods are discharged from the ship. The carrier shall not be required to give any notification of disposition of the goods."

In respect of the Clauses quoted, and, indeed, in respect of other clauses in the said Bill of Lading, except the Clause Paramount, they should, in my view, be construed in the light of, and subject to, the Clause Paramount (Clause 1) – That Clause stipulates, *inter alia,* that the said Bill of Lading shall have effect subject to the Chinese Merchant Marine Act of 1929 and any subsequent amendments in force, which shall be deemed to be incorporated therein, and that if any term of the said Bill of Lading is repugnant to the 1929 Act to any extent, such term shall be null and void to

that extent but no further. In this connection, Article 93 of the 1929 Act *inter alia* stipulates: "In the event that the whole or a part of a ship is provided for carriage, the carrier or shipmaster shall, when preparation of unloading the goods is completed, forthwith notify the consignee. At the instant when the goods being unloaded leave the ship, the carrier or shipmaster relieves his responsibility of carriage." It may be observed that, in my view, the operation of the "relieving of responsibility" Clause must necessarily depend on the observance of the "notification of the consignee" clause. Here, there is no evidence that the consignee or shipper has been notified by the carrier or shipmaster, as required by this Article. In any event, in my view, the onus is upon the Defendants to show that such notification has been made and they have not done so. In this connection, it is clear that Hong Tai was not the consignee, but the party to be notified. In my view, because of the Clause Paramount and Article 93 of the 1929 Act, any protection which the Defendants seek under Clauses 8, 11, 12 (even if applicable) and 22, will have to be considered in the light of the provisions of that Paramount Clause and Article 93 respectively. In my opinion, failing to show that the express requirement of notification of the consignee had been complied with constitutes a statutory and fundamental breach of the contract of carriage which has the effect of precluding the Defendants the protection sought, on the assumption that the clauses of the said Bill of Lading specified are applicable in the circumstances: it is evident that a breaker of one part of the law cannot be allowed to shelter behind another part of the same law. To the extent that any term of the said Bill of Lading is repugnant or contrary to the 1929 Act, such term is null and void (see Clause Paramount).

Even if it can be said that the position is otherwise, and that Clauses 8, 11, 12 and 22 are not so repugnant, it falls to be considered whether all, or any of these clauses, can be relied on by the Defendants as showing that the Plaintiffs have no legal claim against them. I shall deal with each of them.

As to Clause 8, it seems clear from its wording that it is an exception clause. On this basis, the point to consider is whether the Defendants were in fundamental breach of the contract between the parties, as evidenced by the said Bill of Lading. It was submitted by learned counsel for the Plaintiffs that the Defendants were in fundamental breach, since they had delivered the said logs, not to the holder of the Bill of Lading, but to Hong Tai, who was neither the consignee nor the holder. In *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Company Ltd.*[2], the headnote reads:

"Consignment of bicycle parts, ordered by S.T. Co. of Singapore, shipped by respondent bicycle manufacturers on motor vessel Glengarry under bill of lading providing that goods were to be delivered at Singapore "unto order or his or their assigns" – Clause 2(c) of Bill of lading provided:

> 2. During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this bill of lading that may be inconsistent therewith, viz., ... (c) In all other cases the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom.

Goods discharged into Singapore Harbour Board godown on arrival – Documents sent by respondents to Bank of China at Singapore to hold until bill of exchange was paid – Possession of goods obtained by S.T. Co., without production of bill of lading to shipowners' agents, against letter of indemnity signed by appellant S.H.T. Bank – Bill of exchange not paid – Claim by respondents against shipowners for breach of contract or conversion – S.T. Co. and S.H.T. Bank joined as third parties by shipowners, who claimed to be indemnified by them – Judgment by High Court of Singapore in favour of respondents, with declaration that shipowners were entitled to be indemnified by third parties – Appeal by S.H.T. Bank dismissed by Court of Appeal of Singapore – Appeal by S.H.T. Bank – Whether shipowners protected by Clause 2(c).

Held, (1) that there was a prime obligation upon shipowners to deliver the goods "unto order or his or their assigns" and shipowners were liable unless protected by the exemption clause; (2) that the extreme width of the exemption clause was not within the contemplation of the parties and that there was an implied limitation on the clause; (3) that if that extreme width were given to the exemption clause it would run counter to the main object and intent of the contract; and, accordingly, the clause should be modified, at least, so as not to permit the shipowners deliberately to disregard their obligations as to delivery; and that, therefore, the shipowners were not exempted by Clause 2(c) and were liable."

The following passage appears in the judgment of the Privy Council (at Pages 120 – 121).

"It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was "unto Order or his or their assigns" that is to say, to the order of the Rambler Cycle Company, Ltd., if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver

the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by Clause 2 of the bill of lading, which says that:

> 2. During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this bill of lading that may be inconsistent therewith, viz., (a) so long as the goods remain in the actual custody of the carrier or his servants (– here follows a specified exception –). (b) Whilst the goods are being transported to or from the ship (– here follows another specified exemption –). (c) In all other cases the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom."

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company, Ltd., complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause, upon its true construction, absolved the shipping company from an act such as that, it seems that, by parity of reasoning, they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: "Of course not." There is therefore an implied limitation on the clause, which cuts down the extreme width of it; and, as matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for. But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects the proper delivery of the goods by the shipping company, "unto Order or his or their assigns", against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract, see *Glynn and Others* v. *Margetson & Co. and Others,* [1893] A.C. 351, at p. 357; *G.H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama,* [1956] 1 Q.B. 462, at p. 501; [1955] 2 Lloyd's Rep. 722, at p. 741; [1957] A.C. 149, at p. 164; [1956] 2 Lloyd's Rep. 379, at p. 387.

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. ..... And they deliberately disregarded one of the prime obligations of the contract. No Court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause. See *The Cap Palos,* [1921] P.458, at p. 471; (1921) 8 Ll. L. Rep. 309, at p. 312.

The appellants placed much reliance, however on the case which came before their Lordships' Board in 1909 of *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Company, Ltd.* [1909] A.C. 369. There was there a clause which said (*ibid.*, at p. 374) that

> ... In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle ...

The goods were discharged at Penang and placed in a shed on the jetty. While there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability.

Their Lordships are of opinion that that case is readily distinguishable from the present, as the Courts below distinguished it, on the simple ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind."

Further, it is established law that it is a principle of construction that exceptions in a contract are to be construed as not being applicable for the protection of those for whose benefit they were inserted if the beneficiary had committed a breach of a fundamental term of the contract, and a clause requiring a claim to be brought within a specified period is an exception for this purpose (see *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty Son & Co.*).[3] In his judgment (at p. 1473) Devlin, J. (as he then was), stated: "I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. ..." Here, it was submitted by learned counsel for the Defendants that delivery of the said logs was effected on August 17, 1979, when their discharge from the Lung Yung was completed. However, it seems clear that, even on the assumption that the said logs can be said to have been delivered on that day, they were, on the facts, certainly not delivered to the "order" of the Plaintiffs as shippers, or to the holder of the Bill of Lading. It is established law that a Bill of Lading is not a contract of carriage

between the parties, but is excellent evidence of its terms (see *Playing Cards (M) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.*[4]; *Rambler Cycle Co.* v. *P. & O. Steam Navigation Co. (supra)*). One of the main objects of the contract as evidenced by the said Bill of Lading is the proper delivery of the goods by the carrier "to the order" of the shipper, against the production of the bill of lading. It would defeat this object entirely if the carrier was at liberty, at its own free will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences (see *Sze Hai Tong Bank, Ltd.* v. *Rambler Cycle Company Ltd.* (*supra,* at Page 121). In my view, the circumstances under which the delivery of the said logs was made by the Defendants clearly constituted a breach of a fundamental term of the contract of carriage, and the Defendants should not be allowed to take advantage of an exception clause, as Clauses 8 and 27 of the bill of lading, in my view, clearly are. As to Clause 27, I would add that the question of giving notice did not form the subject matter of the submission of learned counsel for the Defendants and I do not propose to dwell on it.

I shall now deal with Clauses 11 and 22 of the Bill of Lading. Learned counsel for the Defendants has submitted that para. 8 of the supporting affidavit of I Lung Guo shows that the Defendants had fully complied with the relevant regulations relating to the discharge of goods at the port of Kaohsiung; and that the discharge was carried out pursuant to and in compliance with a Special Permit issued by the Customs Authorities at that port. Further, Clause 22 of the Bill of Lading shows that the carrier's authority to discharge is wide. Notice had been given to Hong Tai, and that clause exempted the Defendants from responsibility upon the said logs being discharged. It was emphasized that the Plaintiffs or the consignee had failed to take delivery. Clause 22 of the said Bill of Lading (except the last para. which is not relevant) reads:

"22. The port authorities are hereby authorized to grant a general order for discharging immediately upon arrival of the ship and the carrier without giving notice either of arrival or discharge, may discharge the goods directly they come to hand, at or on to any wharf, craft or place that the carrier may select, and continuously Sundays and holidays included, at all such hours by day or by night as the carrier may determine no matter what the state of the weather or custom of the port may be. All lighterage and use of craft in discharge shall be at the risk and expense of the shipper and/or consignee. Landing and delivery charges and port charges shall be at the expense of the shipper and/or consignee unless included in the freight herein provided for. The goods shall be received for completion of delivery thereof by the consignee at the time of discharge from the ship, but the carrier retains the option of delivery at all times from the ship's side, or from craft, hulk, custom house, warehouse, wharf or quay or otherwise. Shipper and consignee authorize the carrier that in case the consignee is not ready to take delivery of the goods as soon as the ship is ready to discharge them, or when direct delivery of the goods from ship's tackle, deck or hold to the consignee would cause or be in danger of causing detention or delay in sailing of the ship, or loss of or damage to the carrier or to the goods, persons or cargo aboard the ship or, should otherwise be disadvantageous thereto, the goods may, at carrier's discretion and subject to carrier's lien be landed and sent to store or warehouse or be permitted to lie where discharged or landed, always at the risk and expense of the goods. The goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. In any case the carrier's responsibility shall cease at the time when the goods are discharged from the ship. The carrier shall not be required to give any notification of disposition of the goods."

As regards the first paragraph, it is common ground that permission was granted by the custom authorities at Kaohsiung for the discharge of the said logs, but this permission was based on a joint application made by a representative which in the circumstances would appear to be an agent, of the Defendants and Hong Tai, which was represented as "the consignee designated on the manifest.' Clearly, this joint application must have been made in compliance with Article 3 of the "Regulations for Clearing Imported Logs through Customs" (see para. 4 of affidavit of Michael Ong Kee Tuan affirmed on 20/3/81, and its exhibits). The English translation of part of that Article reads: "The shipping company or its agent together with the consignee of the logs as inscribed in the import manifest (hereinafter referred to as the Consignee) shall make before the actual discharge a joint application to the customs for the special permission of discharge of the cargo ..." As stated, Hong Tai was not the consignee, nor has it been shown that it was at the material time an agent or other person authorised to act on behalf of the 1st Plaintiff. On the facts as filed and admitted for the purposes of these proceedings, it seems clear that Hong Tai was misrepresented to the customs authorities at Kaohsiung as being the consignee. It seems clear that, without this misrepresentation, those authorities would not have given permission for discharge. Hence, in my view, the Defendants, through its representatives or agents the master of the Lung Yung, who was responsible for the inward manifest and San Yew Co. Ltd., who was jointly responsible for making the joint application for permit to discharge, being apparently guilty of misrepresenta-

tion, cannot be allowed to benefit from this. Further, although Clause 22 of the Bill of Lading states that "the carrier without giving notice either of arrival or discharge, may discharge the goods directly they come to hand ...", this provision, in my view, is contrary and repugnant to Article 93 of the 1929 Act, in that the consignee was not notified by the carrier or shipmaster when preparation of unloading the goods was completed. In this connection, it seems clear that at least part of the Lung Yung was provided for the carriage of the said logs. In connection with Clause 22, I would add that the said logs cannot, in my view, be said to have been taken into the custody of the custom authorities at Kaohsiung, as Exhibit M.O.5 to the affidavit of Michael Ong Kee Tuan affirmed on March 20, 1981, clearly shows. Accordingly, in my view, Clauses 11 and 22, or either of them, does not avail the Defendants.

For the reasons given, I find that the Defendants have not succeeded in showing that the said logs have been delivered to the 1st Plaintiff on August 17, 1979. This leads me to a consideration of Clause 27 of the Bill of Lading. As already mentioned, the question of notice of damage of loss by the Plaintiffs did not feature in the submission of learned counsel for the Defendants and I do not propose to dwell upon it. Hence, the relevant part of that clause reads: "No suit shall be maintained unless instituted within one year after the day on which the goods were delivered, or should have been delivered ..." Article 100 of the 1929 Act reads:

"That once the goods have been delivered to the person entitled to take delivery is deemed to be that the carrier has effected complete delivery of the goods in conformity with the specified particulars of the bill of lading; provided, however, that this rule is not applicable to any one of the following instances:

1. That prior to or at the time of delivery, the person entitled to take delivery has notified, in written form, the carrier of the condition of damage or loss.
2. That the damage or loss which is not apparent has been notified, within three days after delivery, to the carrier in written form.
3. That the damage or loss has been stated on the receipt of goods.

The right of claim for indemnity of damage or loss as exercisable by the person entitled to take delivery is extinguished if not exercised within one year from the date of taking delivery of the goods or from the date on which delivery should have been taken."

It is to be noted that under that Article, the carrier is deemed to have effected complete delivery in conformity with the specified particulars of the bill of lading once the goods have been delivered to the person entitled to take delivery. Here, for the reasons given, I find that on August 17, 1979, the said logs have not been delivered to the person entitled to take delivery, that is, the last Plaintiff, or the proper consignee. To the same effect as the above-quoted relevant part of Clause 27 of the Bill of Lading is the corresponding part of Rule 6 in Article III of the Schedule to the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of shipowners and others) Regulations, 1960. For the reasons given, I find that the common limitation period of 1 year prescribed respectively in the provisions mentioned does not avail the Defendants. There remains the question as to when the delivery of the said logs "should have been taken", or when "the said logs should have been delivered". I have not been addressed on this matter by learned counsel for the parties, and it would be presumptuous, in the circumstances, for me to make a ruling on the matter.

I agree with learned counsel for the Defendants that, for the purpose of considering limitation, the material consideration is whether this action has been instituted within the relevant period (see *Compania etc.* v. *Pacific Steam Navigation Co.*[5])

In the premises, the first ground relating to limitation advanced by learned counsel for the Defendants fails.

I now come to the second ground, on jurisdiction. It is common ground that the subject matter of this action is the same as that in an action in the Taipei District Court, Taiwan instituted by the 2nd Plaintiff against Glory Navigation Co. Ltd., Hong Tai Plywood & Lumber Co. Ltd. and True Friend Transportation Co. Ltd. The cause of action, as stated in paragraph 10 of the affidavit of I Lung Guo, is for misdelivery of the said logs under the same Bill of Lading, and the amount claimed is the same as that claimed in this action, that is US$660,776.80. The advocates of the Defendants in this action had, by letter written to the advocates of the Plaintiffs, put the Plaintiffs to their election as to whether they wished to proceed with their action in the Taipei District Court or with this action. The advocates for the Plaintiffs had not given any definite answer and to date the Plaintiffs have not made any election. It seems obvious, in the circumstances, that the Plaintiffs have declined to make any election. The Plaintiffs' answer to the allegation of the Defendants that this action is frivolous, vexatious and an

abuse of the process of the Court is contained in paragraphs 4, 5, 6 and 7 of the affidavit of T.C. Huang, counsel for the Plaintiff in the Taiwan action. They read as follows:—

"4. The action in Taipei District Court, Taiwan, Case No. 2372 of the 69th year of the Republic of China (1980) was by Kelso Enterprises Ltd. only. The Defendants in that case are Glory Navigation Co. Ltd., Hong Tai Plywood and Lumber Co. Ltd. and Truefriends Transportation Company Ltd. The action is a *civil action in personam* for NT$23,820,977 (or US$660,776.80). Although Taipei District court has rendered a judgment in the action, the judgment is subject to appeal to the High Court, to a further appeal to the Supreme Court and frequently to several retrials as result of remand by the Supreme Court. In the event that there is no more than one retrial in the action, a minimum of two years will elapse before a final and irrevocable judgment is handed down and execution proceedings in enforcement of such judgment can be commenced, by which time the assets and cash reserves of the Defendants in the action may have already been transferred and be no longer susceptible to attachment in such execution proceedings.

5. The Plaintiffs in the Taipei Case have not received nor been given any security towards their claim by any of the Defendants thereto. In Taiwan, Plaintiffs cannot arrest the ships owned by Glory Navigation Co. Ltd. unless a security is posted with the Court in an amount no less than one-third of the claimed amount and in the form of cash, bank-issued certificate of time deposit or national treasury debenture, which security would be held by the Court until such time as a final and irrevocable judgment was entered against Glory Navigation Co. Lt. (i.e., a minimum of two years) and which security would entail prohibitively formidable financial cost to the Plaintiffs.

6. Further more, Hong Tai Plywood and Lumber Co. Ltd. had ceased trading. Besides, Glory Navigation Company had sold the vessel "Lung Yung" prior to the institution of the present action in Sarawak.

7. For the reasons aforesaid, it was necessary for Sadit Timber Co. Sdn. Bhd. the consignor and owners of the logs under bill of lading SD/601/79 to commence litigation in Sarawak and thus enable them to arrest the sister ship of Lung Yung to wit "Thai Yung" and obtain security thereby for the Plaintiffs' claim against Glory Navigation Co. Ltd. which the Plaintiffs would be able to do in Taiwan only at the expense of the aforesaid prohibitively formidable financial cost."

Learned counsel for the Defendants has submitted that the action should be dismissed by virtue of Clauses 1, 2 and 28 of the Bill of Lading, and on the authority of the case of *Azimullah* v. *Master of S.S. 'Hallor' & Ors.*[6] It was pointed out that the circumstances here are stronger than those in the *Azimullah's case* (*supra*), in that the Plaintiffs have obtained judgment in their favour in the Taiwan District Court. Hence to allow this action to proceed is not only vexatious, but would involve further costs to the parties.

It was further submitted that, in the circumstances, the proceedings here ought to be stayed. Reference was made to the suggestions made by Baggallay, L.J. in *The Christiansborg*[7] which are as follows:

"First, (the court) may put the party seeking to sue in this country to his election as to whether he will proceed in this country or abroad; secondly, it may stay the proceedings in this country ..... or thirdly, it may grant an injunction restraining the plaintiffs from prosecuting their proceedings abroad."

Learned counsel for the Plaintiffs submitted otherwise. It was contended that, the Defendants had submitted to the jurisdiction of the Court by entering unconditional appearance, and they therefore cannot rely on Clause 2 of the Bill of Lading. In this connection, while it may be correct to say that the Defendants had submitted to the jurisdiction of this Court, the question of whether this action is allowed to proceed in view of the existence of the other action in the Taiwan District Court is, in my view, a different matter. In my opinion, the Defendants are not thereby debarred from relying on Clause 2 of the Bill of Lading in this connection.

In my view, the matter should be approached on the basis of the principle of *lis alibi pendens.* In this connection, learned counsel for the Plaintiffs has put emphasis on the following matters:—

(1) This action does not involve the same parties as that in the Taiwan District Court. In the latter Court the parties are the 2nd Plaintiff here as sole Plaintiff, and the Defendants are Glory Navigation Co. Ltd., Hong Tai Plywood and Lumber Co. Ltd., and Truefriends Transportation Co. Ltd.

(2) There is no abuse of process in these proceedings because the remedies available to the Plaintiffs are different from those in Taiwan. In this connection, it is common ground that while this action is one *in rem,* that in Taiwan is *in personam.* It was pointed out that, whereas no security was taken from or offered by the Defendants in the Taiwan action, security has been obtained in this action from them. The difficulty and high financial cost to the Plaintiff of posting a security for the arrest of ships owned by Glory Navigation Co. Ltd. was emphasized, as was also the point that this action was instituted in order to obtain security for the Plaintiff's claim.

(3) Any inconvenience in getting witnesses to

Sarawak from abroad is no ground for granting a stay, and reliance is placed for this submission on the case of *The Soya Margareta*[8].

I shall now deal with the opposing submissions of learned counsel for both parties. In this connection, it should be borne in mind that the Court will stay an action, brought within the jurisdiction, in respect of a cause of action which arose out of the jurisdiction, if satisfied that no injustice will be done to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression to which he would not be subjected to if he were sued in another accessible Court, where the cause of action arose: *Logan* v. *Bank of Scotland (No. 2)*[9].

The headnote to the *Aximullah's case (supra)* reads:

"The plaintiffs were the consignees of carpets shipped on the vessel "Halldor' from Calcutta to Singapore on two bills of lading issued by the second defendants, a Norwegian shipping company. The vessel was a Norwegian one owned by a Norwegian company whose principal place of business at all material times was Norway. The jurisdiction clause of the bills of lading provided that "Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business and the law of the said country shall apply unless otherwise stipulated herein." The goods were damaged in transit and the plaintiffs commenced these proceedings claiming damages. A warrant of arrest was issued and the vessel was arrested in Singapore pursuant to the said warrant on October 6 but was released on October 7 on the undertaking given by the owners to the plaintiffs to abide by any order which the court might make in this suit.

The defendants applied to set aside the writ and all subsequent proceedings including the warrant of arrest on the ground that the parties had agreed that any dispute under the bills of lading should decided by a Norwegian court.

Held: (1) it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, *prima facie*, the court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is just and proper to do so;

(2) the court has power to set aside the writ and with it the arrest where the parties have agreed by the contract of carriage to submit all disputes to the courts of a foreign country. The court may decide to do so unless it can be shown that only by allowing the action to continue can the plaintiff be given relief to which he is entitled as where the claim has already become barred in the country agreed;

(3) the question of jurisdiction in a dispute of this nature is a matter which is entirely in the discretion of the court which is called upon to decide the dispute. That discretion has of course to be exercised judicially. Each case must be decided on its own merits and the discretion of the court may be exercised one way or other having regard to the circumstances of the particular case;

(4) in this case having regard to all the circumstances the court would exercise its discretion in favour of the defendants and give effect to the jurisdiction clause of the contract. The writ and all subsequent proceedings will be set aside."

In that case the Plaintiffs had already commenced proceedings in Norway, but the case report does not disclose whether those proceedings were *in rem* or *in personam*, which in my view are relevant factors to be taken into consideration, or their respective equivalents under Norwegian law. Further, that case also decides what was specified in headnote (3) above, that is, that the question of jurisdiction depends on the discretion of the court which is called upon to decide the dispute on jurisdiction; that the discretion should be exercised judicially having regard to all relevant circumstances of the particular case; and that each case must be decided on its own merits.

As to what would amount to an action being frivolous or vexatious, by these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable (see Page 317 of English 1979 *Supreme Court Practice*, and the cases there cited). Bowen, L.J., in his judgment in *McHenry* v. *Lewis*[10] said:

"I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case. I think that *Cox* v. *Mitchell*, 7 C.B. (NS) 55, decided nothing more, that it simply lays down the proposition, that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same ..." In *Peruvian Guano* v. *Bockwoldt*[11] the headnote reads:

"An action was brought in this Court by an English company against a firm of French merchants for the delivery of the cargoes of certain ships, or in the alternative for damages, and for an injunction and receiver.

At the commencement of the action the ships were in British waters, but they had since been removed by the direction of the Defendants to ports in France, and the cargoes had been taken possession of by the Defendants. Proceedings had been instituted by the Plaintiffs in a French Court for recovery of the cargoes. The English action comprised a claim for the cargo of one ship which was not claimed in the French action.

A motion, on behalf of the Defendants, that the Plaintiffs might be ordered to elect whether they would proceed with the English action or with the French proceedings was refused."

In his judgment in the lower Court (at Page 227) Bacon, V.C. said:

"I cannot say that the suits are directly alike, or that there is no distinction in the relief asked. Suppose that in France the present Plaintiffs should fail altogether, they may have a case in this country and they may get a decree in their favour. Suppose the Plaintiffs should succeed in France; the effect of that on this suit will be that whenever it comes on for hearing the Defendants will say, You have had that which you sought to have."

On appeal, the following passage appears in the judgment of Jessel, M.R. (at Page 230):

"It may be put, as regards this case, shortly in this way: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? It is very unpleasant, no doubt, to be sued twice – it is unpleasant to many people to be sued once - but still that does not make it vexatious where the plaintiff seeks to get a real substantial advantage."

In the same appeal, Lindley, L.J., in his judgment (at Page 232) said:

"As I understand it it comes to this, that where the plaintiff is suing in this country and also abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter, he must go a step further and show that there is vexation in point of fact, that is to say, that there is no necessity for harassing the Defendant by double litigation ....."

In *The Atlantic Star*[12] the relevant part of the headnote reads:

"A collision took place in dense fog in a channel of the River Scheldt leading to the port of Antwerp. The collision involved a ship belonging to the appellants, a Dutch company, and two barges, one Dutch and one Belgian; the barges were moored at the time. The Dutch barge was owned by the respondents. Shortly after the accident the owners of the Belgian barge and the respondents applied to the Commercial Court at Antwerp for the appointment of a surveyor. Under Belgian law it was the surveyor's duty to investigate the circumstances of the accident with the assistance of legal representatives of the parties involved and to report to the court his conclusions. Accordingly a surveyor was appointed and made his report within 13 months to the court; the report appeared to be favourable to the appellants. There was evidence that, in the event of proceedings before the court arising out of an accident, the court would usually accept the opinion arrived at by the surveyor. Meanwhile, after the surveyor had been appointed, proceedings were brought in the Antwerp court against the appellants by (i) the owners of the Belgian barge, (ii) the owners of the cargo thereon, (iii) the dependants of certain deceased members of the crew thereof, and (iv) by the owners of the cargo on the Dutch barge. The respondents, however, on learning that the appellants' ship was due to call at an in English port, began an action in rem in the Admiralty Court in England against the ship. The appellants entered a conditional appearance and applied for the action to be stayed. They offered to undertake that, if the action were stayed, they would provide reasonable security for the respondents' claim in Belgium. Brandon J dismissed the motion and the Court of Appeal dismissed an appeal on the ground that, although the Antwerp court was the appropriate and convenient forum, the appellants had failed to show any special circumstances which would justify the court depriving the respondents of their right to bring their action in the English courts. On appeal,

Held (Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale dissenting) – The appeal would be allowed for the following reasons –

(i) Although a foreign plaintiff was not lightly to be refused the right to sue in an English court if jurisdiction had been properly founded, that right was not absolute and the court had a discretion to grant a stay. That discretion was to be exercised by taking into account (i) any advantage to the plaintiff, and (ii) any disadvantage to the defendant. The advantage to the plaintiff of allowing the suit to proceed had to be substantial, and not merely fanciful; a *bona fide* advantage was a solid weight in the scale, often decisive, but not necessarily so. In particular in Admiralty proceedings in rem the security provided by the arrest of the ship, or the offer of security in lieu, was an advantage which the plaintiff could legitimately seek. On the other hand the disadvantage to the defendant had to be even more substantial to justify a stay of the action; the words 'oppressive' and 'vexatious' were indicative of the degree and character of the prejudice to the defendant but those words were to be interpreted liberally nor given too restricted or technical an application".

In his judgment (at Page 194) Lord Wilberforce said:

"First, a plaintiff should not lightly be denied the right to sue in an English court, if jurisdiction is properly founded. The right is not absolute. The courts are open, even to actions between foreigners, relating to foreign matters. But they retain a residual power to stay their proceedings ...

Secondly, in considering whether a stay should be granted the court must take into account (i) any advantage to the plaintiff; (ii) any disadvantage to the defendant: this is the critical question and in some case it will be a difficult one to establish. Generally this is done by an instinctive process – that is what discretion, in its essence, is. But there are perhaps some elements which it is possible to disengage and make explicit. In the first place, I do not think it would be right to say that any advantage to the plaintiff is sufficient to prevent a defendant from obtaining a stay. The cases say that the advantage must not be 'fanciful' – that a 'substantial advantage' is enough. .....

Then the disadvantage to the defendant to be taken into account at all this must be serious, more than the mere disadvantage of multiple suits; to prevail against the plaintiff's advantage, still more substantial – how much more

depending how great the latter may be. The words 'oppressive' or 'vexatious' point this up as indicative of the degree and character of the prejudice that must be shown. I think too that there must be a relative element in assessing both advantage and disadvantage – relative to the individual circumstances of the plaintiff and defendant ..."

The judgment, after considering certain judicial authorities, went on (at Page 195):

"I do not find either in their facts or in any statement of principle in them, a general rule which would cover this case. But they do vouch the proposition that a very clear case is needed to justify a stay, where a plaintiff is (properly as to jurisdiction) suing here and that the mere fact that there are proceedings abroad is not enough ..."

In his judgment (at Page 201) Lord Kilbrandon said:

"The rule was stated by Scott L.J. in the *St. Pierre* case [1936] 1 K.B. 398 as follows: first that a plaintiff will not be deprived of his action on a mere balance of convenience, and second, that –

> '(a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff.' "

As stated, one relevant – and important – advantage, and I would consider it to be a substantial advantage, to the Plaintiffs by bringing this action here is that they are able to obtain security, being an action *in rem;* whereas the action in Taiwan, in which the 1st Plaintiff is not a party, is an action *in personam* where no security was offered or taken, and it would imposes a very heavy financial burden to the Plaintiffs to take a security there. Further, the parties in the other action are not the same as in this action. In his judgment in *The "Hartlepool"*[13], Willmer J. (as he then was), said (at Page 146):

"The important thing is that, as I understand it, the proceedings in French North Africa are proceedings in personam. It is not suggested that any security has been furnished on either side in any form, or, indeed, that there is any power to order security in proceedings of the character stated there.

Here, of course, the action which has been started is an action in rem, and if I allow it to proceed the plaintiffs will be able to get here the security which I dare say they desire to have to cover their claim – and it is a remedy which they are *prima facie* entitled to enjoy.

The fact that no security has been furnished in the proceedings abroad distinguishes this case at once from that of *The Christiansborg,* 10 P.D. 141, and the other cases, of which there are quite a number, in which attempts have been made in one form or another to initiate proceedings in rem in two countries at once. Over and over again it has been held that once a ship has been arrested, and bail or security has been furnished, the ship's release has been purchased, and she is free from further arrest in any country in respect of the same claim. But that is something very different from the situation which has arisen in this case.

Here it is merely a personal action which has been started abroad; and where a personal action has been started abroad, and it is desired to sue here as well, there is no doubt that it is a matter for the discretion of the Court whether to make an order in the action in this country."

In the case of *Harmer* v. *Bell & Ors.*[14] the judgment of Jervis, C.J. stated (at Page 128):

"We have already explained that, in our judgment, a proceeding in rem differs from this, the one being in personam, the other in rem; and it follows that the two suits, being in their nature different, the pendency of the one cannot be pleaded in suspension of the other."

From what has already been stated and discussed above, I hold the view that, in the circumstances of this action, it is not frivolous or vexatious, or an abuse of the process of the Court such as to justify this court to strike out the Statement of Claim and to dismiss the Plaintiffs' action.

I now come to consider whether a stay should be ordered, bearing in mind the principles laid down in the cases discussed and the consideration that whether to order a stay is a matter of discretion, to be exercised judicially having regard to the circumstances of this action *(Azimullah's case (supra)* and *The "Hartlepool" (supra)).* Also the discretion should be exercised by taking into account (i) any advantage to the plaintiffs; and (ii) any disadvantage to the defendant, in the sense as laid down in *The Atlantic Star (supra)* and the considerations as laid down in the *St. Pierre's case.*[15] Here, the advantage which I regard to be a substantial one, in respect of security for the Plaintiffs' claim in this action *in rem,* as against the Taiwan action *in personam,* has been mentioned. Among the disadvantages to the Defendants are the following:–

(a) Double suits in two different jurisdictions.

On the authorities, it seems clear that this by itself is no legal justification for ordering a stay, even though the Taiwan action is actively proceeding, and the Taipei District Court has rendered a judgment in favour of the 2nd Plaintiff. From the affidavit of T.C. Huang, which is not disputed,

in the event of there being no more than a retrial in the action, a minimum of two years will elapse before a final and irrevocable judgment is handed down and execution proceedings in enforcing the judgment can be commenced. It is a matter of consideration whether, by that time, it can be assumed that the defendants would have sufficient assets and cash reserves to satisfy the judgment. Further, as stated, the 1st Plaintiff is not a party to the Taiwan action, and the defendants in that action are not identical. Moreover, it is not disputed that Hong Tai Plywood and Lumber Co. Ltd. one of the defendants in that action, had ceased trading, and the difficulty of enforcing any judgment in favour of the 2nd Plaintiff in that action need not be elaborated upon to be understood.

(b) Balance of Convenience, and additional costs.

It is not disputed that the business and assets of the Defendants are in Taiwan, and that this action would entail bringing relevant witnesses and records from that country. It is true that, by instituting two suits in respect of the same subject matter, additional costs would be incurred. However, by themselves, convenience and additional costs are in my view and on the authorities, no adequate reason for ordering a stay. In his judgment in *The Soya Margareta (supra)* Hewson, J. (at Page 760) said: "It is quite clear from the cases to which I have referred in this hearing that balance of convenience is a matter seriously to be considered, but that it is not the only factor which I have to consider ..." Then, after referring to the test laid down in the judgment of Scott, L.J. in the case of *St. Pierre* v. *South American Stores (Gath & Chaves), Ltd. (supra)* and to that part of the judgment of Willmer, J. in *The "Hartlepool" (supra)* which has been quoted above, the learned judge stated (at Page 764): "If I may say so, with respect, I adopt those words of the learned judge with the reminder that in this case the action initiated by the charterers in Italy was, so far as I have been able to discover at this hearing, purely *in personam.* They have, for reasons which they have doubtless considered, chosen to proceed *in rem* in this country and so obtain the security to which I have already referred. Though convenience is a matter, as I have already said, not lightly to be discarded, I do not think that there is such a preponderance of (in) convenience in the getting of the evidence necessary in this case as to make this action so vexatious that I ought to prevent the charterers from following the course which they have chosen." Here, it has not been demonstrated that the getting of evidence in this action is such a preponderance of inconvenience as to make this action so vexatious as to justify a stay to be ordered. If after all other relevant factors had been considered, a stay should not be ordered, then, in my view, the factor of additional costs should not, by itself, tip the scale in favour of a stay in the circumstances of this action. See also *The Soya Margareta (supra)* the headnote of which is set out below.

(c) Proper forum and proper law – Clauses 1, 2 and 28 of the Bill of Lading.

On the authorities, I do not consider that they necessarily constitute bars to an action here; or that, by themselves, a stay should be ordered (see *The Soya Margareta (supra)* and *Azimullah* v. *Master of S.S. "Halldor" & Ors. (supra),* although they are relevant considerations in deciding whether a stay should be ordered. In *The Soya Margareta (supra)* the headnote reads:

"By a charterparty dated Apr. 9, 1958, the Soya Lovisa was chartered to carry cargo from Texas City and Marcus Hook to Venice. The bills of lading incorporated all the terms of the charterparty, which provided (by cl. 13) that the contract should be governed by the laws of the flag of the vessel, which was registered in Sweden, and (by cl. 18) that any dispute between the parties arising during the exercise of the charterparty should be settled in London. The Soya Lovisa duly arrived in Venice at the end of August, 1958, and discharged her cargo. The charterers, who were also the cargo owners, alleged that this cargo was contaminated, and that the contamination had occurred whilst the cargo was on board the vessel. The shipowners denied this. On about Apr. 9, 1959, the charterers instituted proceedings in the Italian courts by issuing a writ in the official Judicial List of Venice, claiming 404,753,273 Italian lire by way of damages. Subsequently, the charterers, being advised that the dispute was within the arbitration clause of the charterparty, instituted proceedings in England in June, 1959, and appointed an arbitrator. The shipowners also appointed an arbitrator, at the same time protesting that the case should be fought in Italy. On July 6, 1959, the charterers instituted proceedings in rem in England, under section 3(4)(b) of the Administration of Justice Act. 1956, and arrested the Soya Margareta, which was also owned by the shipowners and was berthed in London at the time, and obtained security in £300,000 which the shipowners provided to secure the release of the Soya Margareta. No further steps were taken by the charterers after July, 1959, save that they issued their statement of claim on April 1, 1960. On a motion by the ship-owners to set aside the writ of July 6, 1959, or, alternatively, for an order that all further proceedings be stayed in England as vexatious,

Held: the action in England would not be stayed nor the writ set aside because in all the circumstances of the case (and despite the fact that the balance of convenience

might favour proceedings being in Italy) the shipowners had not satisfied the court that the proceedings in the action were vexatious; but, for the protection of the shipowners against proceedings being prosecuted concurrently by the charterers in Italy, an injunction restraining them from proceedings there would be granted."

In that case, it was stipulated in the bills of lading, by incorporation of all the terms of the charterparty that the contract shall be governed by the laws of the flag of the vessel, which was registered in Sweden. There, an injunction was granted restraining the charterers from proceeding in Italy, there being proceedings being prosecuted concurrently by the charterers in that country. Here, in my view, having regard to the course of proceedings in Taiwan, it would not be appropriate to grant an injunction restraining the 2nd Plaintiff from continuing with those proceedings. Moreover, any injunction would not bind the 1st Plaintiff, who is not a party to those proceedings. It is true that the facts in *The Atlantic Star (supra)* are not the same as those in these proceedings, but I know of no authority which precludes the application of the relevant principles laid down in that case to the circumstances here.

In arriving at this decision, I bear in mind, apart from other relevant consideration, the following passages appearing in the respective judgments in the following cases. In his judgment in *The Christiansborg (supra)* Lord Esher, M.R., said (at Page 146):

"..... where the two actions are in two different countries, and that is all which can be alleged *prima facie*, there is no vexation at all and the Court ought not to interfere. It ought not even to put a party to his election *prima facie* at all, but leave him to go on and see in which suit he can get execution first."

Then at Page 148:

"But where the cases in foreign countries, *prima facie* not being vexatious, the man who says it is, must prove clearly to the Court that it is, and that the person suing him in a court with ample jurisdiction would have in every respect the same chance in a foreign court which he has here, and equal facility to enforce the remedy."

At Page 151, the learned Master of the Rolls said:

"But the English Court cannot be satisfied without ample and satisfactory evidence that the procedure in a foreign Admiralty Court is in all respects the same as in the English court, and that the person suing in the foreign court has the same chance and facilities of effective success as he has in this court."

Here, I consider that the same considerations are relevant and in this connection, not least of such considerations is the factor of effective execution of any judgment obtained in the foreign court. In *Peruvian Guano Company* v. *Bockwoldt (supra)* Bowen, L.J. (at Page 234) said:

"... we have no sort of right, normal or legal, to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries, why should the Court interfere and deprive him of it?"

The in *McHenry* v. *Lewis*[10] Cotton, L.J. said (at Page 406):

"Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution."

Weighing the advantages to the Plaintiffs as against the disadvantages to the Defendants if a stay were not ordered in the light of the tests in this respect as laid down in *The Altantic Star (supra)*, and taking all relevant factors in consideration, I find that the advantages to the Plaintiff out weigh the disadvantages to the Defendants if a stay were not ordered, not least of these factors being the matter of security and the fact that the parties in the two actions are not identical. For the reasons given, I also find that the Defendants have not succeeded in satisfying the court (a) that the continuance of this action would work an injustice because it would be oppressive, or vexatious to them, or would be an abuse of the powers of the court in some other way; and (b) that a stay would not cause an injustice to the Plaintiff, these being matters in respect of which the burden of proof falls upon the Defendants (see *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd. (supra)*. Accordingly, after giving anxious consideration to the matter, I consider that, in all the circumstances and in the exercise of my discretion, the stay sought by the Defendants should be refused. In arriving at this decision, I am not unmindful of the three ways suggested by Baggallay, L.J. in *The Christiansborg (supra)*, one of which was respectively adopted in *The Soya* Margareta *(supra)* and *The "Hartlepool"*, but in those two cases, the parties, were the same, which is not the case here. In the circumstances of this action, with some reluctance, I do not consider that it would be appropriate to adopt any of the said three ways.

The application of the Defendants is, for the reasons given, dismissed with costs.

The defendants appealed against the above judgment.

FEDERAL COURT

Chew Pok Oi for the appellants.

Anthony Liew (*David Tiong* with him) for the respondents.

Abdoolcader F.J. (delivering the judgement of the Court): The respondents in this admiralty action in rem claim damages in a substantial sum in relation to the carriage of a cargo of logs on the "LUNG YUNG" from Kuala Baram in Sarawak for delivery to the respondents' order at Kaohsiung in Taiwan on an allegation that the appellants wrongfully delivered the logs to a third party in Taiwan without production of the relevant bill of lading. The appellants filed a defence and then applied by summons to strike out the statement of claim under Order 18 rule 19 of the Rules of the High Court, 1980 and the inherent jurisdiction of the court on the grounds that it discloses no reasonable cause of action and is frivolous and vexations and an abuse of process. We should mention that it was disclosed in affidavit evidence that the 2nd respondent had instituted an action in the Taipei District Court in Taiwan against three parties including the owners of the "LUNG YUNG" in relation to the same subject matter as in the present proceedings, claiming damages for a like amount, and has obtained judgment but this is subject to appeals to the High Court and Supreme Court in Taiwan with the possibility of several retrials as a result of remand by the Supreme Court. The appellants' summons appears to be grounded on the issues of limitation and jurisdiction. Tan Chiaw Thong, J., dismissed the application on November 8, 1982.

The bill of lading provides that it shall have effect subject to the provisions of the Chinese Merchant Marine Act, 1929 or any subsequent revision thereof in force which shall be deemed to be incorporated in the bill and that if any term of the bill of lading were repugnant to that Act to any extent such term shall be null and void to that extent but no further (clause 1). It further stipulates that any dispute arising under the bill shall be covered by Chinese Law except as may be otherwise provided therein (clause 2), and there are other terms in the bill providing for the application of foreign law.

The question of limitation turned substantially on the application and construction of the provisions of the law of Taiwan in the Act of 1929 and also its 'Regulations for Clearing Imported Logs through Customs'. The whole matter appears to have proceeded on false premises in that the question in issue was presented and indeed determinded by the learned Judge virtually taking judicial notice of the relevant laws of Taiwan that appeared to be applicable. This was clearly wrong as foreign law on a particular topic is a question of fact which is to be and can be proved by evidence of experts [section 45(1) of the Evidence Act, 1950; *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)*[16] (at page 181)]. No expert evidence was adduced and the foreign law sought to be relied on was not proved as it should have been. As the question of delivery and limitation revolved around the application of the relevant statutory provisions of Taiwan, the merits of the contentions on this aspect should not have been determined in the way it was sought to be. We therefore affirmed the dismissal of the appellants' summons in this regard but on different grounds on the basis that this can only be determined at a proper hearing and presentation of the requisite evidence.

On the issue of jurisdiction and stay of proceedings, we agreed with the decision of the learned Judge for the reasons and on the authorities he has discussed. The exercise of judicial discretion by him is not to be lightly interfered with and there is a presumption that he has rightly exercised it [*Vasudevan* v. *Damodaran & Anor.*[17] (at page 151)].

We accordingly dismissed this appeal with costs and ordered the deposit in court to be paid out to the respondents, and further directed an early trial of this action.

Appeal dismissed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Goh & Liew.*